

CRIMINAL MISC.APPLICATION No 1798 of 1997
with
CRIMINAL MISC. APPLICATION NO.3514 OF 1997

CRIMINAL MISC. APPLICATION NO.1799 OF 1997
WITH
CRIMINAL MISC. APPLICATION NO.3515 OF 1997

CRIMINAL MISC. APPLICATION NO.1800 OF 1997
WITH
CRIMINAL MISC. APPLICATION NO.3516 OF 1997

CRIMINAL MISC. APPLICATION NO.1801 OF 1997
WITH
CRIMINAL MISC. APPLICATION NO.3517 OF 1997

Hon'ble MR.JUSTICE N.J.PANDYA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

STATE OF GUJARAT

Appearance:

MR AD SHAH, L.A for Petitioners

Mr.M.A.Bukhari, Ld.ADDL.PUBLIC PROSECUTOR for Respondent No. 1
and for Respondent No. 2, Mr.Pranav G.Desai.

CORAM : MR.JUSTICE N.J.PANDYA

Date of decision: 9/10/97

C.A.V. JUDGEMENT

Though there are 8 matters, the substantial matters are Criminal Misc. Applications No.1798 of 1997 to 1801 of 1997. They are the petitions filed under Sec.482 of Criminal Procedure Code praying for quashing of 4 different criminal cases of Chief Judicial Magistrate, Baroda. All the four cases are under Sec.138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act). The remaining 4 applications are filed in the respective main applications praying for recalling the order of issuance of Rule passed by the learned single Judge. The Rule issued in all the four matters is being finally heard. It is obvious that those applications praying for review or recall of the order do not survive.

2. Coming back to the main petitions No.1798 of 1997 to 1801 of 1997, the common question argued in all the four matters is that the complaint filed before the Chief Judicial Magistrate being the one lodged by the power of attorney holder of the payee, is not maintainable as per the provisions of Sec.142 of the said Act.

3. It is an admitted position that the cheque was issued in favour of Surjit Mukesh Rawal. The complaint is filed by the power of attorney holder Mukeshkumar Yuvrajsing Yadav. Sec.142(a) pertaining to the aforesaid question is as under:

"Notwithstanding anything contained in the Code of Civil Procedure, 1973 (2 of 1974),--

(a) "company" no court shall take cognizance of any offence punishable under Sec.138

except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b)

As noted above, the contention raised on behalf of the accused-petitioners is that Sec.142 contemplates filing of a complaint in writing made by the payee or the holder. The complaint having been lodged by the power of attorney, who is obviously neither a payee, nor the owner, is not maintainable. Under the general criminal law, it is an accepted principle that any one can set the criminal law in motion. The moment it is set in motion so far as the procedure is concerned, it will be governed by the Code of Criminal Procedure 1973 (hereinafter referred to as the "said Code"). In the said code itself there are exceptions made in form of Sec.195 to 199 fixing the eligibility criteria for the Court to take cognizance of a given complaint. The aforesaid requirement of Sec.142 of the said Act, therefore, will fall into the same category. In other words, it is an exception to the said general Rule that criminal law can be set into motion by anyone. This can be said to be the common law principle. To the extent if there is an exception to the said common law principle, the Court taking cognizance has to satisfy itself as to the eligibility criteria.

4. Copy of the complaint filed along with the application reveals from the cause title that Surjit Mukesh Yadav is shown to be the complainant and describing himself to be the power of attorney of said Surjit Mukesh Yadav, Mukeshkumar has filed the complaint. No doubt, in the body of the complaint all through out, he uses the word complainant without referring to a donor of the power of attorney or making any distinction as to his own capacity as that of a donee of the power.

5. At the bar, decisions were cited indicating that a complaint can be lodged by a power of attorney holder. This is naturally the endeavour on the part of the complainant-respondent. As against that, the endeavour on the part of the applicant-accused is that when a statute creates an embargo, the condition must be strictly interpreted and especially when that very statute creates a right before it could be exercised, the person claiming to exercise the right must be compelled to act according to the requirement of the statute. At appropriate places the decisions will be considered.

6. The law as to negotiable instruments to the extent to which stands codified in the said act is originating from lex mereatoria assimilated as such into

the body of the common law and codified to the extent as to be found in the said Act and the Indian Contract Act, 1872.

7. Ordinarily, therefore, a person who can act in a particular manner can do so, through his agent. There should, therefore, be no difficulty in accepting the idea that a duly constituted attorney can act on behalf of the payee or holder in due course under Sec.142(a) of the said Act.

8. Till introduction of Sec.138 and other related Sections by way of Addition of Chapter XVII in the said Act with effect from 1-4-1989, if at all there be any offence relating to return of cheque, it was governed by the provisions of the Indian Penal Code like Sections 419, 420 of the Indian Penal Code and in case of forgery etc, 467 and other related Sections of Indian Penal Code. These offences being outside the purview of the aforesaid Sections of the Code, they remain out of exception as to the lodging of criminal complaint by an agent or a constituted attorney of the complainant or the victim of the crime. Going beyond that, conceivably it could be said that a person other than an agent or a constituted attorney of the victim could also set the law in motion as the offences are not covered by any of the aforesaid Sections of the Code.

9. No doubt, it being a part of general law of crime this can well be said to be the position. Further from the point of view of the applicants, when a special offence is created under Sec.138, coupled with creation of eligibility criteria as per Sec.142(a) of the said Act, they would naturally insist upon its strict compliance.

10. As the trade and commerce expanded and the economic activity came to be largely conducted through paper, for payment of various purchases made, services rendered etc. it came also to be increasingly being made by an instrument namely a negotiable instrument. Of necessity, preferred mode would be the cheque, as understood under the said Act. Banking activities had also correspondingly increased and expanded with network of branches covering almost the entire country. Issuance of Cheque, originally confined to privileged few, became a common event for almost every one connected with present day economic activity. Correspondingly, the incidents of cheques being issued without there being sufficient funds in the account or without there being a remote possibility of having sufficient funds from the date of

presentation of cheque also, increased and therefore bouncing of cheques had become rampant. To curb this menace, the offence has been created by Sec.138 coupled with Sec.139 providing for presumption in favour of holder of cheque being for the discharge in whole or in part of any debt or other liability, which ordinarily is of civil nature is sought to be made a criminal offence with the aid of the said presumption and thereby makes it a coercive method of recovery.

11. Now, it cannot be denied that for recovery of a debt, a suit can be filed by an agent, who may be a constituted attorney as well. Order III of the Civil Procedure Code recognizes the concept of authorised agent. The law of agency coupled with the mode of grant of power through a document would allow the party to act through another.

12. Section 138 being a coercive mode of recovery should, in my opinion, admit of the concept of an agent or a constituted attorney in relation to filing of a complaint as per Section 142(a) of the said Act.

13. On behalf of the applicants, the following decisions are cited:

13.1 AIR 1956 SC 604 (Ravulin Subba Rao & ots. vs. Commr. of Income-tax, Madras. Income-tax Act (1922), Sections 26A and 59 read with Rules 6,2 require that for claiming benefit under Sec.23(5)(a), a registration under Sec.26A must be obtained. For obtaining the registration, according to Rule 6, the application must be signed by the partner in person. The question was, whether the signature by an agent on his behalf is valid or not?

13.2 Recognizing the common law Rule of Sui Juris acting through an agent or an attorney, Their Lordships held that the benefit claimed being not under the common law and it being under a specific statute, the requirement prescribed thereunder must be fulfilled strictly. In other words, the act being of a special Act for taxing income, there is no question of applicability of common law and as it operates in its own specific field, for claiming property thereunder also a specific requirement, if any, must be fulfilled. Obviously, this cannot be said to be the position, so far as the said Act is concerned. The said Act contains provisions pertaining to Negotiable Instrument of 3 types only namely promissory notes, bills of exchange and cheques. Except for Chapter XVII, there is no reference to

criminal law at all anywhere in the said Act. There is Chapter XVI taking care of international law because of expanding at a rapid pace of international trade. Nowhere is there any restriction to be found in the said Act as to drawing of the instrument, acceptance of the instrument or negotiation of the instrument, by an agent or through an attorney. If the very origin of the instrument and the subsequent transactions thereto can be through an agent or attorney, there is no reason why in keeping with the overall tenor of the act, the complaint could not be lodged under Chapter XVII and more particularly Sec.142(a) of the said Act by an agent or an attorney. The said Supreme Court authority, in my opinion, does not help the applicants.

13.3 AIR 1992 SC 2609 (Narsimhan & Ots. vs. J.V.Chakkappa. It relates to Sec.198 Cr.P.C. and deals with a complaint for offence of defamation. The complaint was filed by the Chairman of a reception committee of the conference. The alleged offence of defamaiton related to all the members, who, participated in the conference. The complaint filed by the Chairman of the Reception Committee was held to be not by an aggrieved person.

13.4 The reason is that as the conference was not an identifiable or a definite body, it was not possible that all those, who attended the conference, could be set to be the constituents who if the conference in their turn would be said to be defamed. In other words, it was an amorphous entity. None, therefore, can be said to be aggrieved, much less, therefore, the Chairman of the Reception Committee of the Conference and it was struck down. In the instant case, the identity of the payee or holder is not in question. The complaint is also filed in his name. The only grievance is that it is through its attorney. The said decision will have no bearing on the outcome of the present case.

13.5 AIR 1984 SC page 5 (Vishva Mitter vs. (O.P.Poddar and ots.) deals with an offence under Trade and Mercandise Marks Act, where the complaint came to be filed by a dealer as well as a constituted attorney of the owner of the registered trade mark. The learned Judges referring to the general provisions of the Criminal Procedure Code Sec.190 of conferring power on any Magistrate to take cognizance of any offence upon receiving a complaint setting out facts which constituted offence, points out the possibility of attorney being permitted to file a complaint eventhough the requirement was that for an offence under the Trade and Mercandise

Marks Act, it is the owner of the trademark, who can lodge the complaint. The learned Magistrate had dismissed the complaint, as it was not filed by the owner of the trademark. Accepting the argument that the owner can act through the constituted attorney, who happened to be the dealer, the appeal came to be allowed as the complaint is maintainable. In the process, the learned Judges have considered Sec.192 of the said Code along with Sec. 195, 198 etc. as also the offence under the Prevention of Food Adulteration Act. To understand the requirement of eligibility criteria of the complainant, as against the general law, that law of crime can be set into motion by anyone, relying upon this, there are series of judgments under the Negotiable Instrument Act, accepting the view that a constituted attorney can file a complaint under Sec. 138 with Sec.142 of the said Act. Some of them are given below:

1996 ISJ (Banking) 619 - Madras High Court
1996 ISJ (Banking) 621 - Madras High Court
I (1977) BC 247 Punjab and Haryana High Court.
1997 (Banking) 496 Orissa High Court.
1997 (Banking) 517 Punjab and Haryana High Court
1994 (Banking) 36 Calcutta High Court.

No doubt, L.A. Shri Shah had met with the aforesaid decisions by raising a contention that if the holder or paying is a Company, it has to act through some living individual. In case of proprietary concern, the Manager of the Concern would represent it. In my opinion, this distinction is not of much avail. If a complaint is required to be filed by the holder of the payee, can he or can he not act through an agent or an attorney. The Act is silent on the point. As stated above, when the instrument itself can be drawn, accepted and negotiated by an agent there is no reason why an offence created by that very act cannot be pursued in form of a complaint by an agent or an attorney. The requirement of Sec.142 in my opinion is fulfilled, if either the payee or the holder himself alleged the complaint or does it through an agent or the attorney.

13.6 Company Cases Vol.82 (1995) page 776 deals with the submission that if the holder or a payee an instrument is a Company, the power of attorney may be accepted, but in case of individual, it will not be so done, the learned Judge in Ruby Leather Exports has held that it makes no difference if the power of attorney is executed by an individual in favour of another or executed by a Company in favour of a particular person. I wholeheartedly agree with this decision. The said Act

does not make any difference between incorporated Company or an artificial entity as a payee or a holder on the one hand and a living individual as a payee or holder on the other. Whether a Company or a living individual, they would be the payee or the holder as the case may be and therefore, lodging of the complaint will have the same disability or impairment, if any, in relation to the lodging of the complaint. The disablement is that as holder or payee either the Company or the individual must file a complaint. The question is that if they chose to do so, they may lodge the complaint through an agent or an attorney. If the Company can do so, so can the individual. On the same point is 83 Company Cases 673.

14. While agreeing therefore, with Shri A.D.Shah, learned Advocate appearing for the applicants that the eligibility criteria as per Sec.42(a) of the said Act should be fulfilled, I hold that it is fulfilled if the complaint is filed through a duly constituted attorney. The complaint should disclose, as does in the instant case, that it is filed by an attorney. This should be clear in the cause title itself.

15. The said 1956 SC 604 (Ravul Subbarao (Supra)) deals with a partnership firm which wanted to take advantage of benefit under Sec.23(5)(a) of the Income-tax Act, 1922. It may be kept in mind that the underlying idea in partnership is that of agency. Each partner is therefore, an agent of the other. In spite of this, the Rule requires that the partner must sign it in person. This necessarily, therefore, excluded agency of a partner. If, therefore, the requirement is held to be of each partner signing, it is obvious that he has to sign it in person and therefore, no agent can be permitted to sign the same, even if he be a constituted attorney. In other words, the maxim qui facit per alium facit per se cannot be said to be excluded in relation to a statutory provision like Sec.138 read with Sec.142(a) of the said Act.

16. There are, no doubt, certain factual contentions also in relation to the responsibility of the individual accused. These contentions are based on the respective capacity at the time when the cheques were drawn, subsequent to the event of resignation, involvement into the day today management etc. I am not entering into it, as it is a disputed question of fact required to be gone into by the trial Court. This is a part of the defence of the accused, which may help them in getting an order of acquittal if that is the effect of making out these various points, according to law. In fairness, it must

be said that neither side has argued at length on this point at all. They were referred to as L.A. Mr.Shah, as duty bound, opened the argument on that score, on behalf of the applicants. I am not called upon to give a finding on this point. Even if I were, I would not deal with them as they constitute the defence which, in turn leads to resolving the disputed questions of fact.

17. The applications, therefore, fail. They are dismissed. Rule in each matter is discharged. Interim relief is vacated.

Pronounced in the open Court on the 9th day of October 1997.

Further Order:

After the judgment was pronounced, learned Advocate Mr.A.D.Shah, appearing for the petitioners requested that operation of the judgment be stayed for a period of six weeks from today as the petitioners are likely to carry the matter before the higher forum. The request is granted. Operation of the judgment is stayed for a period of six weeks from today.

(N.J.Pandya,J.)

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